RECENT DEVELOPMENTS

ADMIRALTY—DOCTRINE OF UNSEAWORTHINESS OF SHIPOWNER'S VESSEL —SHIPOWNER HELD STRICTLY LIABLE TO LONGSHOREMAN—*Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir. 1966)*—Ernest O. Deffes, a longshoreman employed by Continental Grain Company, was injured in the process of unloading grain from a barge owned by Federal Barge Lines, Inc., and chartered by Gulf-Canal Lines, Inc. After receiving compensation from Continental,[1] plaintiff sought recovery against Federal and Gulf based on the doctrine of unseaworthiness under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.[2]

The injury resulted from an alleged defect in a marine leg, a conveyor belt to which buckets are attached. This mechanical elevator device is introduced through the open hatch and rests on the bottom of the barge. Plantiff claimed that a metal fragment from a worn bucket broke off and hit him in the eye. The fact that the marine leg was the property of Continental and under its exclusive control was not disputed.

The United States District Court for the Eastern District of Louisiana held that a defect in the marine leg would not cause the barge to be unseaworthy.[3] This decision was reversed by the United States Court of Appeals for the Fifth Circuit which ruled that the defective marine leg used in unloading made the barge unseaworthy.[4]

An historical investigation of the cases allowing recovery by a longshoreman against a shipowner under the theory of unseaworthiness is helpful in illustrating this remedy which is available to longshoremen in addition to the right of action under the Act.

The right to recovery by a longshoreman against a shipowner for the unseaworthy condition of a vessel has been uniformly recognized since the United States Supreme Court's decision in *Seas Shipping Co. v. Sieracki.*[5]

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[1] It should be noted at this point that a longshoreman is limited to a single recovery for any element of damage and if recovery from a suit against a third party is given for the same element as recovered under the Longshoremen's and Harbor Workers' Compensation Act, he must reimburse his employer to the extent of the amount which his employer has paid. 33 U.S.C. § 933 (1964), 44 Stat. 1440-41 (1927).

[2] 33 U.S.C. § 907-09 (1964), 44 Stat. 1427-30 (1927), [hereinafter cited as Act].

[3] Deffes v. Federal Barge Lines, Inc., 229 F. Supp. 719 (E.D. La. 1964). The district court, citing McKnight v. N. M. Paterson & Sons, 286 F.2d 250 (6th Cir. 1960), *cert. denied*, 368 U.S. 913 (1961), demonstrated its support of the theory that there should be no recovery under the doctrine of unseaworthiness when the equipment causing the injury was not equipment traditionally found aboard and used in unloading operations.

[4] Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir. 1966). Relying heavily on the opinion of the Supreme Court of the United States in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), Judge Thornberry, in speaking for the court, argued that the important question was whether the plaintiff was performing traditional seaman's work.

[5] 328 U.S. 85 (1946). After discussing the superior ability of the shipowner to bear the financial burden of the injury, the court said, "Historically the work of loading and

In that case, recovery was granted to a longshoreman who, while unloading a ship, was injured due to the breaking of a shackle supporting a ten ton boom owned by the stevedore. The Court has also held that a shipowner's liability is not limited to inherent structural defects or faulty appurtenant appliances and equipment, but encompasses responsibility for an unseaworthy condition caused by defective equipment brought aboard, used and controlled exclusively by longshoremen in loading and unloading a vessel.[6]

The Second and Sixth Circuits have evidenced their displeasure with the results produced by these cases and have attempted to limit their application. In two cases[7] the Sixth Circuit Court of Appeals denied recovery on the ground that the injury was not caused by equipment which was traditionally a part of the ship's appurtenant appliances and equipment. The court expressed its opinion that the rationale of the *Petterson* and *Rogers* cases had been that the resulting injury was caused by defective equipment traditionally used in loading and unloading a ship. The Second Circuit adopted a different interpretation of those cases in its decision in *Forkin v. Furness Withy & Co.*[8] The distinction turned on the fact that the injuries in *Petterson* and *Rogers* had resulted from equipment owned by the stevedore company and used conjointly with the ship's appliances. Recovery was not granted in *Forkin* because the longshoreman's injury resulted from the use of equipment owned solely by the stevedore contractor. But the factual distinctions which these two courts stress do not seem to be viable after consideration of the Supreme Court's instruction to look to the type of work performed by the longshoreman in order to determine liability.[9] If a longshoreman is doing the type of work traditionally performed by a member of the crew he is entitled to recover under the theory of unseaworthiness irrespective of the equipment causing the injury. The Supreme Court's position is that a longshoreman who is performing the same tasks as a seaman under equally hazardous conditions should be protected by the doctrine of unseaworthiness to an equal degree. Recently a longshoreman was permitted to recover under the unseaworthiness doc-

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unloading is the work of the ship's service, performed until recent times by members of the crew." 328 U.S. 85, 96 (1946). Although this has been the traditional language utilized to explain the extension of the unseaworthiness doctrine to longshoremen, its historical accurateness has been seriously challenged. *See* Tetreault, "Seamen, Seaworthiness and the Rights of Harbor Workers," 39 Corn. L.Q. 381 (1954); Shields & Byrne, "Application of the Unseaworthiness Doctrine to Longshoremen," 111 U. Pa. L. Rev. 1137 (1963).

[6] *See* Alaska Steamship Co. v. Petterson, 347 U.S. 396 (1954); Rogers v. United States Lines, 347 U.S. 984 (1954).

[7] McKnight v. N. M. Paterson & Sons, 286 F.2d 250 (6th Cir. 1960), *cert. denied*, 368 U.S. 913 (1961); Sherbin v. S. G. Embiricos, Ltd., 200 F. Supp. 874 (E.D. La. 1962).

[8] 323 F.2d 638 (2d Cir. 1963).

[9] *See* Pope v. Hawn, 346 U.S. 406 (1953); Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963).

trine when he was injured due to a defective unloading hopper located on a pier;[10] another was granted relief for injuries incurred when he slipped on a pile of beans which had been spilled on the wharf in the process of unloading a ship.[11]

The shipowner's liability in these cases is totally divorced from any concept of moral culpability or fault. A philosophy of liability without fault is contrary to our basic beliefs and is utilized only when pursuing a paramount public policy. The shipowner's liability in this area is seemingly predicated on a desire to grant adequate compensation to the longshoreman.[12] The Court's adherence to its decisions permitting a longshoreman to bring a suit under the theory of unseaworthiness indicates that there are some elements of damage in a personal injury suit which are not fully compensated or covered by the Act. Under section 908 of the Act,[13] an injured longshoreman is limited to a maximum recovery of 66 2/3 percent of the wages that he lost due to the injury which prevented him from continuing his usual occupation. Certainly the employee is not being placed in the financial position he would have been had the injury not occurred when he is permitted to recover only two-thirds of his normal wages. Furthermore, although section 907[14] provides that the employer must reimburse the longshoreman for all medical services and supplies which are necessary, there is no allowance made for pain and suffering,[15] which are important elements of damage when a personal injury occurs and often constitute a substantial portion of the pecuniary recovery. In order to insure adequate compensation for longshoremen, courts have permitted them to recover compensation bestowed by the Act and later hold the shipowner liable for the unseaworthiness of his vessel in order to recover damages for lost wages and pain and suffering. The employee is not entitled to a double recovery but must, under the provisions of section 933 of the Act, reimburse the employer for any previously received compensation out of the proceeds of the suit against the third party.[16] By allowing this overlap of remedies the courts have indirectly expressed their dissatisfaction with the extent of compensation that is available to longshoremen under the Act.

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[10] Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965).

[11] Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963).

[12] Seas Shipping v. Sieracki, 328 U.S. 85, 86; Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964). It must be recognized that the longshoreman in performing the functions of loading and unloading a ship is undertaking tasks traditionally performed by the ship's crew. These cases have held that while a shipowner may contract away these functions, the liability for injury while performing these functions may not be contracted away.

[13] 33 U.S.C. § 908 (1964), 44 Stat. 1427-30 (1927).

[14] 33 U.S.C. § 907 (1964), 44 Stat. 1427 (1927).

[15] Furthermore, under this act there is no way to inflict punitive damages on the employer in order to stimulate him to create better working conditions.

[16] 33 U.S.C. § 933 (1964), 44 Stat. 1440-41 (1927). *The Etna,* 138 F.2d 37 (3d Cir. 1943); American Lumberman's Mut. Cas. Co. of Illinois v. Beschner, 97 N.Y.S.2d 781 (Sup. Ct. 1950).

But it is improper to condition the longshoreman's full recovery upon his bringing suit against a shipowner. Congress gave automatic compensation to an injured longshoreman under the Act for the very purpose of alleviating the necessity of a longshoreman bringing suit against his employer. The reason for removing the need of the longshoreman bringing suit was recognition of the precarious financial status that surrounds an injured workman. The workman's disability may suspend his income and the problem of providing his family with the necessities of existence becomes a dilemma of great proportions. The employee's pecuniary condition is so strained that a lengthy and expensive suit against a wealthy opponent as an avenue of compensation, except where he can sue on a contingent fee basis, is usually entirely blocked. Clearly, by failing to adequately compensate the longshoreman under the Act, and thus compelling the bringing of a suit against a shipowner in order to receive full compensation, Congress defeated their express goal of granting compensation without the necessity of bringing suit.

Employers realized shortly after enactment of the Act that it was to their advantage to assist their employees in recovering from a shipowner since employers were entitled to reinbursement, to the extent of their prior payment to the employee, from the award which the employee received.[17] The assistance rendered was in the form of voluntary payments of money. Aid was given in this form in order to avoid falling within the provisions of section 933(b) of the Act, which provided that acceptance by the employee of compensation "under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer" of the employee's right to recover damages from a third party.[18] The statutory assignment took place only when compensation was accepted under an award made by the deputy commissioner. The employer wanted to avoid the statutory assignment, recognizing the possibility that his negligence might bar his action against the shipowner.[19] This informal procedure enabled the injured employee to successfully pursue an adequate remedy in a suit against the shipowner.

The utilization of this inventive device for furthering a suit by a longshoreman, however, was halted when the United States Supreme Court allowed a shipowner to prosecute a suit for indemnity against a negligent stevedore company. [20] Under the indemnity doctrine a shipowner could prosecute a suit against the employer whose negligence had made the ship-

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[17] The employer has this right to reimbursement whether the employer has become the assignee of the employee's right of action against a third party, by paying compensation under an award, or has paid the compensation without an award. *See* note 16 *supra.*

[18] 33 U.S.C. 907 (1964), 44 Stat. 1440 (1927).

[19] Whether his negligence bars an action against a jointly negligent third party is highly disputable and the cases are in irresolveable conflict. *See* 2 Larson, Workmen's Compensation § 75.23 (2d ed. 1959).

[20] Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956).

owner's vessel unseaworthy. The shipowner could recover the full amount of any judgment which had been rendered against him for the unseaworthiness of his ship and which was in fact due to the employer's negligence. In reference to the assistance which employers had been rendering to help employees recover against shipowners, Justice Black, dissenting, suggested that the majority opinion in *Ryan* took away all incentive for employers to follow this course in the future since any recovery by an employee against a shipowner would be recouped in an action by the shipowner against the employer.[21]

While there is a certain amount of validity in Justice Black's observation that *Ryan* would tend to eliminate any contribution of funds by an employer in order to assist an employee in bringing suit against a shipowner, it seems that he may have directed his criticism at the wrong object. The procedure by which the employer gave "quick money" was not provided for in the Act. To the contrary, section 933(a) distinctly provides that the employee should elect between receiving compensation under the Act and filing suit against a third party. An employer's contributions were not induced by the altruistic motive of fully compensating the employee. Rather, by giving the employee this money, the employer could avoid liability for his own negligence and place the burden of paying on the shipowner. The majority in *Ryan* realized that the employer was utilizing this device to avoid the responsibility of paying for his wrong-doing. In order to prohibit the employer from shifting the burden of payment in this fashion, the Court held that the shipowner could sue the negligent employer for indemnity and thus impose liability on the person who was actually responsible for the injury. Perhaps Justice Black should have criticized the Act because it failed to adequately compensate the injured longshoreman instead of criticizing the decision which halted transferring the burden of payment to a nonnegligent party.

Although the *Ryan* decision resulted in the cessation of the process by which a negligent employer would assist an employee to recover from a shipowner, it seemed that a nonnegligent employer would continue to assist its employees in recovering. The form of this assistance would be either by giving the employee money or by prosecuting a suit against the shipowner for the benefit of the employee, if the cause of action were assigned to the employer. But one case may limit the employee's recovery in a still larger number of cases.[22] In this case Czaplicki, a harbor worker, was injured when the ship's steps he was standing on collapsed. He received compensation under an award by the deputy commissioner. Travelers Insurance Company, the employer's insurer, paid the award, and Czaplicki's cause of action passed to it by subrogation. Despite this statutory assignment the United States Supreme Court allowed Czaplicki to bring suit on the grounds of unseaworthiness and negligence against the ship's owner, its operators and the contractor who had built the steps. Permission to bring this suit was predicated on the fact that Travelers had also insured the contractor who made the steps and therefore Travel-

[21] *Id.* at 144.

[22] Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956).

ers ultimately would be liable if the court found the steps negligently constructed. Travelers would not prosecute the cause of action that was assigned to it as Travelers would be the one liable for the damages. The Court was of the opinion that a conflict of interest was present due to the fact that "Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced."[23] Therefore it was held that Czaplicki was not precluded from enforcement of his rights in an action brought by himself, although there was a previous statutory assignment of his rights of action.

In response to the Supreme Court's consideration of the harshness of section 933 of the Act and the injustices which it tended to produce in the *Ryan* and *Czaplicki* cases, Congress amended this section in 1959. The election requirement of section 933(a)[24] was abolished. Section 933(b)[25] was amended to provide for assignment by operation within six months of the compensation award. Furthermore, section 933(e)[26] was changed to provide that the employer could retain one fifth of the excess recovered over the amount that the employee would have received as compensation under the Act.

By virtue of this amendment a longshoreman can collect benefits under the Act for six months, during which time he has the opportunity to decide whether or not to bring suit against the shipowner. In addition, if he does decide to sue the shipowner he will continue to receive these payments until a decision is reached in his suit against the shipowner. This is in contrast with the situation which existed before this amendment was enacted. Prior to the amendment, the employee had to decide immediately whether to receive compensation under the statute; electing to receive compensation would result in his cause of action against the shipowner being assigned to his employer. Alternatively, he could elect to sue the shipowner and, as a consequence, have no income at all until a verdict was reached in his suit against the shipowner. Although the position of the longshoreman was improved considerably by the amendment, in an appreciable number of cases he will still be limited to less than full recovery. In cases where a serious accident or even death occurs there will be a large number of debts incurred by the victim's family between the time of the accident and the date when a formal award is made by the deputy commissioner under the Act. In many circumstances it is probable that the family will have trouble meeting these expenses, not to mention the cost of lengthy litigation. The family is double-vexed as they have only six months in which to bring a suit. Furthermore, an individual might not bring a suit due to his satisfaction with the compensation afforded by the statute but later discover more serious injuries. The short six month statute of limitations will bar recovery against a shipowner for any injury which manifests itself more than six months after the award is made.

By altering section 933(e) of the Act to enable an employer to receive

[23] *Id.* at 530.

[24] 33 U.S.C. 933 (1964), 44 Stat. 1440-41 (1927).

[25] *Id.*

[26] *Id.*

one fifth of the excess recovered against a third party. Congress was attempting to induce employers to vigorously prosecute a suit for the benefit of their employees.[27] The very inclusion of this revision in the statute indicates Congress' anticipation of a significant number of cases where the employee would still have to rely on his employer bringing a suit. This provision will probably not have any appreciable effect because few employers will be tempted to bring a suit to receive twenty percent of the excess when the shipowner will have the defense of the stevedore's negligence. In addition, it is not clear that the protection of the conflict of interest theory, espoused by the Supreme Court in *Czaplicki*, is still available to a longshoreman due to the enactment of these amendments. Congress apparently thought it had alleviated the difficulty which the conflict of interest theory was adopted to remedy by bestowing additional benefits on the employee. The congressional committee reported as follows:

> In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action . . . . [T]he bill as amended by the committee provides greater protection to injured workers and corrects defects in existing law. It carefully protects the interests of all who are involved and balances the equities.[28]

There has been an acute shortage of cases dealing with the problem of whether the conflict of interest doctrine will continue to be recognized. In *McClendon v. Charente Steamship Co.*,[29] the district court ruled that the amendment to section 933 overruled and replaced the conflict of interest theory. On appeal, the Fifth Circuit rejected the rationale of the district court and ruled that the application of the conflict of interest doctrine is still proper.[30] The latter approach was also utilized by a district court in *Castro v. United States*.[31] The Supreme Court of the United States has not yet considered a case of this nature, so even those cases which have raised the issue may not be controlling in the future.

In addition to the above mentioned difficulties, a great multiplicity of litigation will result from allowing the shipowner to recover against employers, on the theory of indemnity, after the employee sues the shipowner for the unseaworthiness of his ship. This circuitous route of recovery could be avoided by allowing an employee to proceed directly against his employer. Of course, the "exclusiveness of liability" clause of the Act[32] would have to be deleted to permit a suit of this nature. But an amendment of this type would not have great practical ramifications as we are presently accom-

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[27] McClendon v. Charente Steamship Co., 348 F.2d 298, 300 (5th Cir. 1965).

[28] McClendon v. Charente Steamship Co., 227 F. Supp. 256, 258 (S.D. Tex. 1964).

[29] *Id.*

[30] *See* note 27 *supra.*

[31] 230 F. Supp. 967 (D.P.R. 1964).

[32] 33 U.S.C. § 905 (1964), 44 Stat. 1426 (1927). In substance this provision states that the compensation given by this act is the exclusive remedy which an employee or his family has against his employer.

plishing a similar result by permitting shipowners to sue negligent employers in an indemnity action. The United States Supreme Court has refused to abide strictly by the literal connotation of the language of the "exclusiveness of liability" clause.[33] Although the provision states that "The liability of an employer prescribed in section 904 . . . shall be exclusive and in place of all other liability of such employer to the employee . . . ,"[34] the Court still granted the longshoreman recovery in a suit against his employer. The amount of financial expense involved simply in the bringing of a suit against a shipowner is astronomical compared to the alternative of compensation under the statute which is practically expenseless. A few examples will illustrate this statement.

In *Holley v. Mansfred Stansfield*,[35] counsel reported that the plaintiff recovered 1,597 dollars compared to a total cost of 24,293 dollars incurred by the shipowner. The shipowner subsequently successfully sued the employer for indemnity, and thus the employer was liable for the sum of 24,293 dollars. The recovery under the statute would have been approximately 23,791 dollars—without the burden of litigation. Since the Act provides that the employer must make up any difference between the amount recovered against a third party and the amount procurable under the Act, the widow still received 23,791 dollars.[36] This case points out the vast incongruities which result from the present Act. The employer should have incurred an expense of 23,791 dollars; due to the fact that he was responsible for the costs of the circuitous suit against the shipowner, his total expenditures amounted to 46,487 dollars. On the other hand, the plaintiff brought suit against the shipowner in order to collect full wages and, after a long and time consuming litigation, recovered only the amount that was recoverable under the Act.

In another suit in which damages for the death of a longshoreman were sought,[37] the parties agreed to a settlement of 215,000 dollars. After fees, costs and a claim in subrogation, the widow and five children received only 141,018 dollars.

In conclusion, there is no doubt that the goal of just compensation for injury to a longshoreman can be fulfilled most effectively by a rule applied uniformly, regardless of the incidental circumstances surrounding the accident. A longshoreman should not be limited to an inadequate remedy due to his inability to establish the elements of unseaworthiness or because of a personal financial deficiency. In pursuing the goal of fully compensating an injured longshoreman an attempt should also be made to alleviate multiple litigation and to decrease the expenses of litigation with respect to all of the

[33] Reed v. The Yoka, 373 U.S. 410 (1963). A longshoreman was allowed to recover under the doctrine of unseaworthiness from his employer, a stevedore contractor, who had chartered the ship on which the injury to the longshoreman occurred.

[34] *See* note 32 *supra*.

[35] 186 F. Supp. 212 (E.D. Va. 1960).

[36] 33 U.S.C. § 933 (1964), 44 Stat. 1440-41 (1927).

[37] Olson Estate, 25 Pa. D. & C.2d 622, 625 (Orphan's Ct. 1961).

parties involved. The legislative attempt to remedy the deficiencies of the Act by the 1959 amendment was unsuccessful in that it continued to circumvent the real problem. But there is no logical reason why Congress should be preoccupied with enabling the longshoreman to sue a shipowner. The problem could be entirely abated by increasing the benefits under the Act and thus affording adequate compensation without the necessity of bringing suit against a shipowner. If giving full wages and compensating for pain and suffering without providing opportunity for the other party to defend himself is deemed unwise, then provisions should be made for the employee to sue his employer directly. In this manner the practice of relegating an employee to an action against the shipowner, who in turn sues the employer, would be discontinued. Therefore, two possibilities exist by which the goal of adequate compensation can be realized. This aim could be achieved by a statute granting compensation to a longshoreman and giving an additional right to bring suit against his employer. Alternatively, if compensation under the present Act is to be the longshoreman's sole source of recovery the remedy it provides should be increased to a level consistent with the amount of damage incurred.